to comply with certain requirements for notice of the sale (Pet. App. C, p. 53); that plaintiff was the owner of the property (Pet. App. C, p. 54); and that the defendant was liable to the plaintiff in the amount of $8,125.72, based on the fair market value of the property as of October 1931, the date of the sale (Pet. App. C, p. 55). Plaintiff contends that the value of the property and the court's award should have been based on the highest value between the time of sale (Oct. 1931) and the time of trial (May 1959); and that the value should be adjusted upwards because of the diminishing value of the dollar and because of the sentimental value of the property to the petitioner. The petition seeks this Court's review of these contentions.

ARGUMENT

The petition has advanced no proper basis for the exercise by this Court of its certiorari jurisdiction. The case arises under a special jurisdictional statute, and the decision rests on the particular facts involved and the evidence relating thereto. The case does not present a question of general or public importance warranting review by this Court. Furthermore, if anything, the Court of Claims award is excessive rather than inadequate.

1. Petitioner's contentions in this Court all relate to the measure of damages employed by the Court of Claims. But that court sought to apply what is generally recognized as the proper standard for evaluating damage to or loss of personal property, the fair market value of the property as of the time the injury took place. 2 Sedgwick, *Damages* (9th ed.

1912) 962–64. That has been the rule applied by this Court since at least 1888, see *Galigher* v. *Jones,* 129 U.S. 193, 200, and it is the law in the State of New York, where the alleged wrong in the instant case took place. *E.g., Mechanics & Traders' Bank* v. *Farmers & Mechanics' Nat'l Bank,* 60 N.Y. 40, 52.

In urging that she is entitled to the highest market price that the property might have had up until the date of trial, petitioner attempts to rely on the "rule of highest intermediate value"; however, that rule is simply not applicable to petitioner's case. In the first place, that rule, as stated by both this Court, *Galigher* v. *Jones, supra,* 129 U.S. at 200–202, and the New York Court of Appeals, *Baker* v. *Drake,* 53 N.Y. 211, 216–17, is applicable only for determining damages with respect to property of widely fluctuating value, such as stocks and commodity futures. See 2 Sedgwick, *op. cit. supra* at 1007–1008, 1009–1011. It is plain from the context of the decided cases that the value of property cannot be said to "fluctuate" for the purpose of this rule simply because there is a general increase in the cost of living. And yet, as far as appears from this record, the alleged increase in the value of petitioner's property is not attributable to anything but the overall rise in the cost of living in the thirty years since 1931.

In the second place, even if petitioner's property could be considered as "property of fluctuating value" within the reach of the rule, the decisions of this Court and the New York courts have established that the period of time within which the "highest intermediate value" may be claimed is sharply limited. The

owner of such property is entitled to benefit only from increases in value that take place within "a reasonable time after the owner has received notice" of the injury or loss to the property. *Galigher* v. *Jones, supra,* 129 U.S. at 201–202; *Smith* v. *Savin,* 141 N.Y. 315, 36 N.E. 338; 2 Sedgwick, *op. cit. supra* at 1007–1009. And where, as here, there is no evidence that the value of the property was any different a reasonable time after the loss from what it was at the time of the loss (or notice thereof), there is no basis for applying the rule at all. *Griggs* v. *Day,* 158 N.Y. 1, 22–23, 52 N.E. 692, 698–99; 2 Sedgwick, *op. cit. supra* at 1007.

Petitioner does not seem to dispute that, in passing the special jurisdictional statute on which her claim was based, Congress intended to do no more than to waive the statute of limitations and the defense of laches. See, *e.g., United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 162–163. Thus, it was the purpose of Congress to assure petitioner of whatever recovery she would have been entitled to had she brought her suit within the period of limitations allowed by the applicable statute. There is certainly no indication of any intention on the part of Congress to put her in any better position than she would have been had she sued within the statutory period, and in view of the long-standing doctrine that special jurisdictional statutes "are to be strictly construed," *United States* v. *Goltra,* 312 U.S. 203, 210, no such intention should be inferred.

Since the alleged increase in the value of petitioner's property results, so far as appears from the record,

solely from the general rise in the cost of living, the foregoing discussion applies equally to petitioner's contention that the amount of the damages should be increased to take account of the declining value of the dollar. Petitioner would have the Court announce novel doctrine; she is able to cite no case decided by this Court or any other federal court, nor by any New York court, sanctioning the injection of "diminished purchasing power" as an element of damages.[3]

2. Although the United States has not itself petitioned for a writ of certiorari, should the instant petition be granted the Government reserves the right to demonstrate that the award of $8,125.72 is unwarranted and excessive, rather than insufficient. Since the property was actually sold on the market for $880, the judgment of the court as to the market value of the property appears clearly excessive, particularly in the light of the declared value of $952.94 and the appraised value of $800. Indeed, the court recognized the probable excessiveness of its findings; it based its determination of value on the amount specified in a baggage insurance policy to cover the transportation of the property from Germany to the United States, which valuation was "at least equal to,

[3] Petitioner seems to recognize that her contention in favor of additional damages for the special value of the property as family heirlooms would not warrant a grant of the writ of certiorari (Pet. 18). Such an element of value is so vague and uncertain that even petitioner has been unable to specify any money equivalent. In any event, the manifest overevaluation of the property by the Court of Claims, discussed below, must be assumed to have taken account of such elusive factors of value.

and probably in excess of the fair market value of the items at that time" (Pet. App. C, p. 79).[4]

Furthermore, since the property in question was dutiable[5] and the then-applicable duty on this property was 80 percent of the market value of the property,[6] the duty on property of a market value of $8,125.72 would be $6,500.58. Thus, even if the court's determination of market value were accepted, the damage to petitioner would be a little over $2,500, after deducting the applicable duty from the market value and crediting petitioner with the proceeds of the sale.[7]

---

[4] Insurance policies are generally regarded as questionable sources of evidence as to market value. *Adelphia Hotel Co.* v. *Providence Stock Co.*, 277 Fed. 905 (C.A. 3); *Union Pac. R. Co.* v. *Lucas*, 136 Fed. 374 (C.A. 8).

[5] The items found to be not dutiable represent an insignificant part of the property involved (Pet. App. C, pp. 47–48, 77). They were sold for $47, or slightly over 5 percent of the $880 for which all the property was sold.

[6] Tariff Act of 1922, Par. 1428, 42 Stat. 917.

[7]

Market value of articles sold		$8,125.72
Statutory customs duty (80%)	$6,500.58	
Proceeds of sale credited	−880.00	
Balance of customs duty due		−5,620.58
Net damage to petitioner		$2,505.14

Presumably some small adjustment would have to be made for the items found by the court to be duty-free. See note 5, *supra*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
JOHN G. LAUGHLIN, JR.,
PAULINE B. HELLER,
Attorneys.

AUGUST 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961